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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE DIRECTORS GUILD OF AMERICA, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SCREEN ACTORS GUILD, INC., WRITERS GUILD OF AMERICA, EAST, AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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60

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE ASPECT OF THE 1998 ACT ESTABLISHING THE COPYRIGHT TERM APPLICABLE TO NEW WORKS IS CONSTITUTIONAL	7
A. The Copyright Clause	7
B. The First Amendment	19
II. THE ASPECT OF THE 1998 ACT ESTABLISHING THE COPYRIGHT TERM APPLICABLE TO EXISTING WORKS IS CONSTITUTIONAL	25
A. The Copyright Clause	25
B. The First Amendment	29
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) 10, 11
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 22
Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) 11
Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985) ..... *passim*
Harry Fox Agency, Inc. *v. Mills Music, Inc.*, 543 F. Supp. 844 (E.D.N.Y. 1982), *aff'd sub nom. Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) 12, 13
Hill v. Colorado, 530 U.S. 724 (2000) 22
Landgraf v. USI Film Products, 511 U.S. 244 (1994) 6
McCulloch v. Maryland, 17 U.S. 316 (1819) 18
Pennock v. Dialogue, 27 U.S. 1 (1829) 8
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936) 11
Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 19, 23, 24
The Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191 (7th Cir. 1987) 15, 16
Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 19, 20, 22, 30
Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) 10, 25, 27, 29
United States v. Lopez, 514 U.S. 549 (1995) 9
United States v. OBrien, 391 U.S. 367 (1968) 22
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 22

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL & STATUTORY MATERIALS — Page

U.S. Const. art. I § 8, cl. 8 ..... *passim*
17 U.S.C. § 102 15
17 U.S.C. § 104A 7
17 U.S.C. § 106 11
17 U.S.C. § 107 15
17 U.S.C. §§ 302-304 5
54 Geo. 3, ch. 156 (1814) 8
Statute of Anne, 8 Anne, ch. 19 (1710) 8
Act of Feb. 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436 8
Copyright Act of May 31, 1790, 1 Stat. 124 8
Pub. L. No. 105-298 § 105, 112 Stat. 2829 (1998) 3

CONGRESSIONAL MATERIALS

Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the House Subcomm. of Courts and Intellectual Property of the Comm. on the Judiciary, 104th Cong. ("1995 House Hearing") 15, 17
The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary, 104th Cong. 35 ("Senate Hearings") 16, 17
Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the House Subcomm. on Courts and Intellectual Property of the Committee on the Judiciary, 105th Cong. ("1997 House Hearing") 14

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 60-2222 (1909)	8
H.R. Rep. No. 94-1476 (1976)	8, 9, 18, 26
S. Rep. No. 104-315 (1997)	14
OTHER MATERIALS	
15 The Papers of Thomas Jefferson 367-68 (Princeton, 1958)	7
N. Bailey, *A Universal Etymological English Dictionary* (24th ed. 1776)	7, 9
Saul Cohen, *Duration*, 24 UCLA L. Rev. 1180, 1181 (1977)	14, 15
European Union, Council Directive 93/98, 1993 O.J. (L. 290/9)	9
House Comm. On the Judiciary, 21st Cong., Report to Accompany a Bill on Copy-right (Dec. 17, 1830), *reprinted in Gales & Seaton's Register*, App. cxix	8
Samuel Johnson, *Dictionary of the English Language*, (3rd ed. 1768)	7

INTEREST OF THE AMICI CURIAE [1]

Amici Curiae are associations of creative artists in the audio and visual media.

The Directors Guild of America (DGA) is an association of more than 12,000 directors, assistant directors, and unit production managers. Their creative work includes theatrical, educational and documentary film and television productions, as well as videos and commercials. The DGA seeks to protect and advance directors' legal and artistic rights, to contend for their creative freedom, and to secure them fair compensation.

The American Federation of Musicians of the United States and Canada (AFM) is an international labor organization of over 110,000 professional musicians in the United States and Canada. Musicians represented by AFM record albums, movie sound tracks, television and radio programming, and commercials under industry-wide collective bargaining agreements negotiated by the AFM. Those agreements enhance the economic situation of recording musicians by, for example, providing for compensation tied to the revenues generated by their recorded product.

The American Federation of Television and Radio Artists (AFTRA) is a national labor organization representing more than 80,000 performers and newspersons who are employed in the entertainment, news, advertising, and sound recording industries. AFTRA members perform on television, radio, sound recordings, and CD-ROM's. To ensure that AFTRA members receive proper compensation for their creative efforts, AFTRA works to protect the intellectual property rights of its members and to prevent unlicensed uses of the works on which AFTRA members appear.

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[1] The parties have consented to the filing of this brief. No part of this brief was written by counsel for a party. No one other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

The Screen Actors Guild, Inc. ("SAG") is an organization of over 96,000 professional actors and performing artists, including dancers, singers, and stunt performers, in film and television productions. The ability of SAG-represented performers to realize the compensation to which they are entitled by virtue of their performances is inextricably tied to the protection of intellectual property rights and to the prevention of unauthorized copying of the film and television productions in which they perform.

The Writers Guild of America, East (WGA East) is a labor organization of over 6,500 professional authors of stories and screenplays for television, film, and interactive media. The Writers Guild of America, west, Inc. (WGA west), in turn, is a labor organization of over 8,500 professional authors of stories and screenplays for television, film and interactive technologies. Both WGA East and WGA west seek to ensure that writers' intellectual property rights are protected, to advance writers' freedom of expression, and to secure fair compensation to writers for their creative work.

As the creators of audiovisual works, the members of the *amici curiae* organizations have a vital interest in a copyright system that recognizes the central role of artists in the creation of those audiovisual works by encouraging the creation and broad dissemination of creative works and by protecting artists against unauthorized uses of their works. In many instances, these artists' compensation is tied to the successful commercial exploitation over time of the copyrighted works they have created. Congress recognized the vital role that the artists play in creating the works that enhance the nation's cultural life in the text of the Copyright Term Extension Act of 1998: "It is the sense of Congress that copyright owners of audiovisual works for which the term of copyright protection is extended by the amendments made by this Act, and the screenwriters, directors, and performers of those audiovisual works, should negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements

with respect to the amount of remuneration to be divided among the parties for the exploitation of those audiovisual works." Pub. L. No. 105-298 § 105, 112 Stat. 2829 (1998).

SUMMARY OF ARGUMENT

The Copyright Term Extension Act of 1998 ("1998 Act") extends by 20 years—to the author's life plus 70 years in the case of individually authored works, and 95 years in the case of works for hire—the term of copyright for works created after its enactment (the "new works" aspect), and for works that were under copyright as of the date of its enactment (the "existing works" aspect). Both aspects of the Act comport with the Copyright Clause and with the First Amendment.

I. A. The Copyright Clause, in order to "promote the Progress of Science," in the sense of "knowledge" and "learning" generally, grants Congress the power to "secur[e] for limited Times to Authors ... the exclusive Right to their ... Writings...."

In ordinary usage, the copyright term established by the 1998 Act is a "limited Times" term. And, the action of the First Congress in setting the initial term of copyright by reference to the term then in effect in England confirms that it is proper for Congress to set the "limited Times" copyright term within the framework provided by widely accepted standards in the international community. That is what the 1998 Congress did in starting from, and after deliberation determining to adopt, the standard of the 1993 European Union copyright directive.

The 1998 Act is, as well, an enactment that serves to promote the progress of Science. Congress concluded that the 1998 Act would do so in two ways: first, by providing an incentive for the creation of *new* works; second, by providing an incentive for the publication and dissemination over time to a changing public of works *already created*. The Petitioners' primary attack on that conclusion is to argue that copyright's sole legitimate role is promoting the creation of

new works, and they make that argument to elide copyright's role in promoting the dissemination of works already created. But this Court's decisions recognizing that promoting artistic creation is but one goal of copyright, and that an additional goal—indeed the ultimate goal—is to promote the wide *dissemination* of the works thus created, leave no room for that argument.

B. The "new works" aspect of the 1998 Act is consistent with the First Amendment.

The Constitution's text speaks directly to the constitutional system for advancing and protecting free speech in two places: in the Copyright Clause's affirmative grant of legislative power to provide for an intellectual property regime vesting authors with exclusive rights in their writings as a means of promoting free speech and in the First Amendment injunction against laws abridging the freedom of speech. Read together as a unified whole, the Constitution's two express speech provisions lead to the conclusion that copyright law enactments that elaborate basic copyright norms, and that do so in manner that is consistent with basic copyright principles, are an integral component of the Constitution's free speech regime, not enactments that abridge the freedom of speech. The 1998 Act is such an enactment and is constitutional as such.

II. It follows from the foregoing that the "existing works" aspect of the 1998 Act is constitutional as well.

A. It is decisive with respect to the "limited Times" requirement of the Copyright Clause that the extended term applicable to existing works under the 1998 Act is the same term applicable to new works. In both instances, the period is equally limited. And, the "existing works" aspect of the 1998 Act promotes "Science" by promoting the dissemination and periodic re-dissemination of existing works that are in their extended term in exactly the same way as would a law setting an identical term passed prior to the time those works were created.

B. The existing works aspect does not violate the First Amendment. Petitioners base their First Amendment attack on the new works aspect on the premise that the *only* governmental speech-promoting interest that justifies a copyright law is the interest in stimulating the creation of new works. That premise is the same one that underlies Petitioners' argument that the Act does not promote "Science," and it is erroneous for the same reason. Deprived of its premise, the Petitioners' argument fails.

ARGUMENT

The Copyright Term Extension Act of 1998 ("1998 Act" or "CTEA") establishes the term of copyright for works created after its enactment (the "new works" aspect), and for works that were under copyright as of the date of its enactment (the "existing works" aspect). *See* 17 U.S.C. §§ 302-304. As to both categories of works, the CTEA establishes a longer term than that established by the Copyright Revision Act of 1976 ("1976 Act"). Whereas the 1976 Act provided that the basic copyright term for individually authored works is the author's life plus 50 years, the 1998 Act provides life plus 70 years. And, whereas the 1976 Act provided a 75-year term for "works made for hire," the 1998 Act provides a 95-year term. 17 U.S.C. §§ 302-304.

In establishing a copyright term that applies uniformly to all works that have not fallen into the public domain—and in thus declining to make a distinction between works copyrighted pre-enactment and works copyrighted post-enactment—the 1998 Congress followed the unbroken line formed by every Congress to have legislated on the matter, including the First Congress. See *infra* at 26. *No* Congress has ever extended the copyright term for new works without also providing a like extension for works under copyright at the time of enactment.

In this case, the Petitioners, invoking the Copyright Clause and the First Amendment, have filed a complaint challenging

the constitutionality of both the new works aspect of the 1998 Act and the existing works aspect of the CTEA. But in their merits brief to this Court, the Petitioners concentrate their attack on the existing works aspect of the CTEA; indeed, they strive to make it appear that all that the 1998 Congress was about was extending the copyright term of existing works.

By taking one aspect of the 1998 Act out of its statutory context, the Petitioners distort what Congress was in truth about—which was to set a copyright term of general application. By so doing, Petitioners seek to skew constitutional analysis of the CTEA in their favor.

To correct that distortion—and to put the constitutional issues the Petitioners tender back into focus—we begin by addressing the basic question of the constitutionality of the copyright term of general application set by the 1998 Act and by demonstrating that the Act is consistent with both the Copyright Clause and the First Amendment.

We then address whether the 1998 Congress—in following the pattern set by earlier Congresses of establishing a copyright term for existing works that is congruent with the term for new works—acted in conformity with both the Copyright Clause and the First Amendment, and demonstrate that the answer is in the affirmative.[2]

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[2] Throughout their brief, the Petitioners describe the extension of the copyright term in existing works as a "retroactive" act by the 1998 Congress. *E.g.*, Pet. Br. at 2, 14, 17, 18. Their label is incorrect. In Justice Scalia's incisive formulation in his concurring opinion in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the "critical issue" in determining whether a rule is "retroactive" is "what is the relevant activity that the rule regulates." *Id.* at 291. And, the activity the 1998 Act regulates with respect to works under copyright on the date of enactment is the dissemination of those works after the Act's effective date—an activity the CTEA seeks to encourage by extending the economic incentive to disseminate works provided by copyright. *See infra* at 10-18. There is therefore nothing "retroactive" about extending the duration of copyright protection in existing works, and for that reason we refer to that aspect of the CTEA as the "existing works" aspect. (By way of contrast, the "retroactive" label in copyright would apply to a law that imposed liability for a previously permitted use, such as a law restoring the copyright in a public domain work that had been exploited pre-enactment by users other than the copyright owner. *Cf.* 17 U.S.C. § 104A.

I. THE ASPECT OF THE 1998 ACT ESTABLISHING THE COPYRIGHT TERM APPLICABLE TO NEW WORKS IS CONSTITUTIONAL

A. *The Copyright Clause.* The Copyright Clause, in order to "promote the Progress of Science," grants Congress the power to "secur[e] for limited Times to Authors . . . the exclusive Right to their . . . . Writings . . . ." U.S. Const. art. I § 8, cl. 8. The 1998 Act is a proper exercise of that power.

1. In ordinary usage, the copyright term established by the 1998 Act—life plus 70 years in the case of individually authored works, and 95 years in the case of works for hire—is a "limited Time[s]" term. To "limit," according to dictionaries in use at the time of the Constitution's framing, means "to set Limits or Bounds to," N. Bailey, *A Universal Etymological English Dictionary* (24th ed. 1776), or "to confine within certain bounds," Samuel Johnson, *Dictionary of the English Language* (3rd ed. 1768). And, the CTEA does "set [temporal] limits or bounds" to the term of copyright.

While the Constitution states that the term of copyright shall be for "limited Times" it does not set the number of years or the maximum number of years in a proper "limited Times" term. Thomas Jefferson did propose in an August 28, 1789 letter to James Madison that the Bill of Rights include an amendment that would prescribe the number of years constituting the maximum duration of copyrights and patents. *See* 15 The Papers of Thomas Jefferson 367-68 (Princeton, 1958). But no such proposal was adopted.

Nor do the contemporaneous debates or other constitutional materials establish a calculus for setting a point in time

at which a copyright in a work is to terminate and the work is to enter the public domain.

The upshot, as the Court stated in respect to the Patent Clause, is that these "exclusive right[s] shall exist but for a limited period, and that period shall be subject to the discretion of Congress." *Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829).

In exercising that discretion, every Congress has started its deliberations from the evolving judgments in the international community as to a proper copyright term and used those judgments as its lodestar.

The First Congress followed the English Statute of Anne. *Compare* Copyright Act of May 31, 1790, 1 Stat. 124 (establishing 28-year maximum duration of copyright) *with* Statute of Anne, 8 Anne, ch. 19 (1710) (same).

By 1831, England had extended the term specified in the Statute of Anne, 54 Geo. 3, ch. 156 (1814), and taking that and other international developments into account, Congress lengthened the term of copyright to 42 years noting that doing so placed authors in the United States "more nearly upon an equality with authors in other countries." House Comm. on the Judiciary, 21st Cong., Report to Accompany a Bill on Copy-right (Dec. 17, 1830), *reprinted in Gales & Seaton's Register*, App., cxix. *See also* Act of Feb. 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436.

The 1909 Congress, while declining to adopt the 1908 Berne Convention's copyright term of life of the author plus 50 years as the United States term, was spurred by the adoption of that international standard to reconsider the United States term of copyright and after lengthy deliberation to increase it to 56 years. *See* H.R. Rep. No. 60-2222 (1909).

Then, after the most detailed and prolonged consideration, the 1976 Congress did determine that the proper course was to adopt the Berne Convention standard on the basic copyright term as the United States standard. *See* H.R. Rep.

No. 94-1476, at 135-136 (1976). And, inasmuch as the Register of Copyrights had informed Congress that the average work was authored 25 years before the author's death, the 1976 Congress adopted a term of 75 years (25 plus 50) applicable to works for hire and to pre-enactment individually authored works. *Id.* at 135.

Finally, the 1998 Congress, in establishing the terms at issue in this case, took as a guide the 1993 European Union Copyright Directive, which called for a basic copyright term of the author's life plus 70 years. *See* Council Directive 93/98, 1993 O.J. (L. 290/9).

As the action of the First Congress confirms, the Copyright Clause contemplates that it is a proper exercise of that power for Congress to set, and of course to reset, the "limited Times" copyright term by reference to widely accepted standards in the international community. And, so long as Congress acts within that framework—as every Congress has—there is nothing to the Petitioner's argument that Congress treats its Copyright Clause power to set the copyright term as a power without an "outer limit" that stands on a different footing from the Commerce Clause power, which as this Court held in *United States v. Lopez*, 514 U.S. 549 (1995), must be interpreted as having some "judicially enforceable outer limits." See Pet. Br. at 11-12.

2. The 1998 Act is, as well, an enactment that serves to "promote the Progress of Science."

(a) It is common ground that the word "Science" at the time of the Constitution's framing connoted "knowledge" and "learning" generally. N. Bailey, *A Universal Etymological English Dictionary* (24th ed. 1776); Pet. Br. at 14-15 & n.4 (setting forth identical definitions of "Science"). The copyright regime promotes knowledge and learning in at least two ways: first, by providing an incentive for the creation of *new* works of authorship; second, by providing an incentive

for the dissemination over time to a changing public of the works the author *has created*.

The Petitioners seek to elide copyright's role in promoting the dissemination of works already created. They assert that the "only" copyright interest "that this Court has recognized" is "providing incentives to authors to create original works," Pet. Br. at 40, as a prelude to belittling the contribution of the 1998 term extension to the creation of new works and to arguing that that term extension for existing works does not serve any legitimate copyright purpose. *See also* Pet. Br. at 15 ("'[T]he Progress of Science' means 'artistic creativity,' *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), 'the creative activity of authors,' *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546 (1985) . . . , 'the creative effort,' *id.* at 450, 'the creation of useful works,' *id.* at 558 . . . .").

The Petitioners' postulate that the sole office of copyright is to stimulate the creative impulse—on which their entire elaborate legal presentation rests—could not be more wrong. Given the importance of that postulate to the Petitioners' case, we devote ourselves here to demonstrating just how wrong it is.

At the threshold, the very cases cited by Petitioners establish that promoting artistic creation is but one goal of copyright, and that an additional goal—indeed the ultimate goal—is to promote the widespread *dissemination* of the works thus created. As this Court said in *Twentieth Century Music*, "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music, and the other arts." 422 U.S. at 156 (emphasis added). And, in *Harper & Row*, the Court said that "copyright supplies the economic incentive to create *and disseminate* [works]." 471 U.S. at 558 (emphasis added). See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (the "goals of the copyright law" are "to stimulate the creation *and*

publication of edifying matter") (emphasis added) (internal quotation marks omitted).[3]

As the Court has thus recognized, the copyright law is at several removes from a law that directly fosters creativity by providing for an immediate and certain grant payment to an author for creating a new work. In contrast, the copyright law *indirectly* fosters creation by an author by *directly* fostering dissemination of the author's works through an economic incentive to exploit those works. That incentive takes the form of the exclusive right to reproduce the work and to distribute copies of the work to the public by sale, rental, or lease, and to perform the work publicly. See 17 U.S.C. § 106 (listing the exclusive rights protected by copyright).

The effect of conferring those exclusive rights on the author is to guarantee that a copyright holder who invests the

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[3] The Petitioners stray even further when they suggest that the only "aim" of copyright—and the only way that copyright legislation can promote the "Progress of Science"—is by "induc[ing] the production of something 'new to the world,'" Pet. Br. at 15-16 (quoting *Pennock v. Dialogue*, 27 U.S. at 20), or by "'bring[ing] forth new knowledge,'" Pet. Br. at 16 (quoting *Graham v. John Deere Corp.*, 383 U.S. 1, 8-9 (1966)). Both quotations are from *patent* cases and reflect the principle that an invention to be patentable must be novel. It long has been established that a work need not be novel to be entitled to copyright protection, and that the only copyright requirement is that the work be "original" in the sense of owing its origin to the author as opposed to being copied. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (Hand, L., J.).

The Petitioners make a similar error when they attempt to derive from this Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), the proposition that copyright is concerned only with inducing the creation of new works. *Feist* simply held that a person who compiles facts cannot claim to be the "Author" of those facts within the meaning of that term as used in the Copyright Act or in the Constitution's Copyright Clause, because facts do not originate in the mind of the author. *Feist* indeed reaffirms that "[o]riginality does not signify novelty." 499 U.S. at 345-46.

time, work, and money involved in the often risky venture of exploiting a work by marketing it and distributing it, is entitled to the full economic rewards of the work's success. Indeed, it is axiomatic that, without that guarantee's protection against unauthorized third person exploitation of the work, a myriad of worthy works would never reach the public. That would be so where, as is often the case, no one would have an adequate incentive to incur the risks involved in the dissemination undertaking if he knew that any favorable early reception of the work would predictably be followed by the prompt appearance of free riders able to appropriate a share of the potential proceeds. See *Harper & Row*, 471 U.S. at 559 ("If every volume that was in the public interest could be pirated away by a competing publisher . . . the public soon would have nothing worth reading.") (Internal quotation marks omitted).

The same exclusive rights "intellectual property" system that spurs the copyright holder to expend the effort involved in the creation and initial dissemination of a work, spurs the copyright holder to expend the effort involved in the periodic dissemination of the work over time so as to bring the work to changing publics. As Judge Weinfeld cogently explained in *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 862-63 (E.D.N.Y. 1982), *aff'd sub nom. Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985):

> Artistic production does not end with completion of a creative work by the artist. The public interest depends on the broad public availability of the works. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Copyright protection, in addition to encouraging authors, also induces publishers . . . to invest their resources in bringing creative works to the public by the prospect of a profitable return.
>
> As with other [copyright holders], permitting music publishers to share in the extended term offers opportunity for additional returns, thereby encouraging them to invest further in copyrighted musical works and thus contribute further to the dissemination of such works.

In many circumstances—and particularly in the circumstances of most concern to the *amici curiae* as creators of audiovisual works—the advance of technology generates a clear public interest in encouraging additional efforts to disseminate works that, though disseminated in one medium, have not yet been disseminated in later-developed media. For example, the developments whereby video cassettes have supplemented the screening of motion pictures as a means of disseminating films, and DVD's are in the process of supplanting videocassettes, has generated a corresponding need to provide for the re-dissemination of films in these new formats.[4]

In many other circumstances, the repeated dissemination of works over periods of time in a *single* medium plays a large role in assuring a full, varied and lively culture. Musical and literary works are often discovered or rediscovered years after their initial publication in response to changes in public tastes and interest. As one composer who testified before Congress put it:

> There are innumerable composers whose works *never* reach their pinnacle of public recognition until after their death. Herman Hupfeld ("As Time Goes By"), Vincent Youmans, and Charles Ives are just three examples. Whether it is because their music is *avant-garde*—or out of synch with what is currently popular—such artists toil

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[4] Indeed, where new media render old media obsolete—as in the case of compact discs, which so thoroughly displaced vinyl records as the principal medium through which musical works are disseminated that the phonograph players and turntables needed to play vinyl albums have become virtually nonexistent (a fate that is one day expected to befall the videocassette player)—there is an especially heightened public interest in re-dissemination of works, since the old media copies have become all but useless.

in obscurity for most of their creative days. [*Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong.* ("1997 House Hearing") 85.]

At the same time, the author of a work will face costs and risks in reintroducing and marketing his work to the public in a new medium—or in the same medium as the original—that are similar in kind to the costs and risks faced in the initial introduction of a work to the public. The public's interest is too fickle and uncertain to make prediction accurate and the putative first entrant must take account of the increasing ease and rapidity with which opportunistic copiers can enter on his heels and siphon off the revenues his marketing and other preparatory efforts made possible. *See* S. Rep. No. 104-315, at 8, 14 (1997). The re-release of old films, which are in poor physical condition and must be restored at great expense, is a particularly telling example of just how high the costs and risks of re-dissemination can be. *See* S. Rep. No. 104-315 at 13.

In sum, a main social benefit of a longer copyright term is that it provides a continuing economic incentive to make periodic disseminations of works over time that justifies incurring the costs and taking the risks associated with that undertaking. *See* Saul Cohen, *Duration*, 24 U.C.L.A. L. Rev. 1180, 1181 (1977) ("[T]here are works worth being kept in print that would not be published if the publisher could not be assured that his edition would be the only one available to capture such market as might exist. Why invest in printing and advertising if another publisher with a low overhead can

reproduce an earlier edition by photocopying and sell it for substantially less?").[5]

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[5] To put the point developed in text regarding the copyright system's role in promoting the wide dissemination of works into some perspective, we briefly note a few additional salient points:

First, in addition to the copyright system purposes noted in text, copyright gives force to the author's superior claim to the financial rewards reaped from exploiting his works and recognition to the importance of providing fair compensation to authors for their creative endeavors. Lengthening the term of copyright is a means of serving these purposes and by so doing of providing the social benefit of encouraging authors to create and disseminate their works.

Second, no matter how many works are under copyright, the copyright system continues to exert its salutary effect of encouraging the creation and dissemination of new works. Where a copyright systems obtains, each person has the right to create and disseminate his *own* copyrightable work. In so doing, that person has the right to draw on the ideas in works under copyright, *see* 17 U.S.C. § 102, *viz.*, to follow themes, plot devices, and other structural elements of copyrighted works; and to make "fair use" of works under copyright, 17 U.S.C. § 107—subject only to the limitation that he may not reproduce and disseminate the particular expression of an idea in an author's copyrighted work in whole or in substantial part. That narrow limitation can not possibly be said to negate, or even to compromise, the copyright system's encouragement of the continuing process of creating and disseminating new works.

Third, the copyright system benefits are not realized at the cost of promoting copyright holder monopoly pricing and its inefficiencies. Unlike patented pharmaceuticals, for example, copyrighted works are highly substitutable and must compete in the market with other similar works, which pushes the price of copyrighted works toward the competitive market level. *See Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the House Subcomm. of Courts and Intellectual Property of the Comm. on the Judiciary*, 104th Cong. ("1995 House Hearing") 584. As was pointed out in the hearings on the 1998 Act, "[a] motion picture company that seeks to charge $129.95 for a videocassette of a popular action-adventure film will quickly discover that most of its prospective buyers will choose a competitor's lower-price action-adventure film instead." *Id. See also The Saturday Evening Post Co. v. Rumbleseat*

(b) In the series of hearings it conducted in the years preceding passage of the 1998 Act, Congress heard—and determined to credit—abundant testimony to the positive effect of an extension of the copyright term on the dissemination of works already created A few examples capture the essence. Bruce A. Lehman, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, testified that:

> The consumer cannot enjoy a public domain product that is stuffed away in the Library of Congress somewhere unless he gets on a plane and goes to do it . . . [I]f you really want to get works out to the public all over the country and all over the world, you have got to give business the incentive of the copyright so they have

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Press, Inc., 816 F.2d 1191, (7th Cir. 1987) (Posner, J.) (Copyright "does not forbid the making of close substitutes").

Fourth, the copyright system, like any private property system for inducing productive activity, is imperfect in that it does not assure that each and every copyright holder (intellectual property owner) will be skillful and diligent in exploiting his property right. But our entire economic system rests on the proposition that no system for inducing productive activity is perfect and that the private property system is the least imperfect in that the great majority of property owners will seek—whether through their own efforts or through licensing or transfer arrangements—to maximize the value of their assets.

Fifth, given the multitude of motivations for creating and disseminating works, the multiple means of providing outside subsidies to these activities and the fact that certain works realize their full economic potential almost immediately on release, there can be no doubt that some baseline number of works would be created and disseminated in the absence of a copyright system. But there also can be no doubt that copyright serves to generate the creation and dissemination of works at a level well above that baseline. Nor can there be a doubt that copyright has its most marked effect in the creation and dissemination of works that have a lasting value rather than a mere initial transitory appeal—like the motion picture "Wizard of Oz," which was not commercially successful in its initial release, and through re-release became a classic.

> something to work with, the property right that they can protect, and then they will republish new editions of works. They will put them in videocassette form and audiocassette form and CD-ROM and multimedia and so on. [*The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 35 ("Senate Hearings")]

See also id. at 34 ("[W]e are not just talking about the incentive to create. We are talking about the incentive to take already existing works and reuse them in new formats."); *id.* at 34, 115 (testimony of Register of Copyrights Marybeth Peters to same effect).

In his testimony before the House Subcommittee on the Courts and Intellectual Property, Mr. Lehman added that:

> This wasn't just something we considered in my office; every single department of the administration with any involvement in this—the Justice Department, the U.S. Trade Representative, the Education Department, and others—support this view. On balance, we felt that the commercial incentive of the additional period of time warranted supporting the legislation above and beyond the international implications [warranting the legislation]." [1995 House Hearing at 222.]

And, in response to a question from Senator Brown, Patrick Alger, President of the National Songwriters' Association, put the point in graphic practical terms:

> When a work goes into the public domain, the two parties (namely the music publisher and the author) that had the most interest in exploiting the work no longer participate in the revenue flow. What generally happens is that works become harder to find and works that were marginally popular disappear altogether. [*Id.* at 123.]

On the basis of extended consideration of all the testimony on the effects of an increase in the term of copyright—both pro and con—Congress came to the eminently reasonable

conclusion that the passage of the 1998 Act would promote "Science" in precisely the ways that copyright is intended to promote "Science": by promoting the creation of new works *and* by promoting the broad dissemination of works already created to changing publics over periods of time. That amply justified conclusion provides a more than sufficient base for the 1998 Congress' exercise of its Copyright Clause power to set the term of copyright.[6]

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[6] Petitioners' call for judicial review of Congress' choice of the copyright term on a heightened scrutiny basis that demands more than that the choice be reasonably related to promoting Science is doubly improper.

First, as noted by the Court of Appeals, it ignores that the Copyright Clause is supplemented by the "Necessary and Proper" Clause, the latter of which clauses authorizes legislation that is "appropriate" and "plainly adapted" to a substantive grant of legitimate power. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

Second, any such heightened review would read the Copyright Clause as one that assigns to the courts the role of prescribing the length of the maximum permissible copyright term. And the Clause cannot sensibly be read to make such an assignment.

"The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law." *See* House Report No. 94-1476 (1976), at 33. It is a debate in which the proponents on both sides are forced to make their case on unproved and unprovable postulates rather than on argument from scientific empirical studies. No such studies have been performed to date, and, given the complexity and multiplicity of variables at play, it is doubtful that any empirical study *could* be constructed that would be sufficiently sophisticated.

Complicating the matter further is that any such study—even if one could be developed—would invariably present decisionmakers with tradeoffs that could be resolved only by reference to subjective value judgments rather than objective facts. The study might reveal, for example, that a certain category of works (*e.g.* works of potential, but unpredictable, popular appeal) will be disseminated or re-disseminated over time only if the term is *x* years or longer, whereas the dissemination or re-dissemination of a different category of works (*e.g.*, works with no commercial appeal but perhaps with some noncommercial appeal) will be delayed under a regime with a term of *x* years or longer.

There is of course no principled basis on which it can be argued that the kinds of works that would be disseminated only under the protection of a longer copyright term would be less valuable to the public in "knowledge" and "learning" terms than the kinds of works whose dissemination would be delayed by such a term.

B. *The First Amendment.* The Petitioners fault the court below for categorically rejecting their First Amendment challenge to the new work aspect of the 1998 Act while doing little to give any legal substance to that challenge beyond proposing two irreconcilable tests for judging the validity of their claim.

First, the Petitioners suggest, and then all but abandon, the proposal that an act setting the duration of the term of copyright:

> should be reviewed under the very same standard that *Harper & Row* announced and applied: that copyright law may be upheld against First Amendment challenge insofar—but only insofar—as it protects an "engine of free expression," *Harper & Row*, 471 U.S. at 558. and that it should be invalidated if its restrictions "merely inhibit access to ideas without any countervailing benefit," *Sony [Corp. of America v. Universal City Studios, Inc.]*, 464 U.S. 417, 450-51 [1984]. [Pet. Br. at 36-37.]

Second, and without attempting any reconciliation with the first test, the Petitioners say that an act setting the term of copyright should be reviewed under the heightened First Amendment standard of *Turner Broadcasting* which provides that an enactment will withstand constitutional scrutiny only

> [1] if it advances important governmental interests unrelated to the suppression of free speech and [2] does not burden substantially more speech than necessary to

> further those interests. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997). [Pet. Br. at 39; *see also id.* at 40 n.14.]

The Petitioner's first test is not a general First Amendment test at all. Rather it is quite appropriately a Copyright Clause/First Amendment-specific test that is derived from this Court's copyright cases, and that is rooted in the understanding that the Copyright Clause and the First Amendment are so closely related in the constitutional text as to require that they be read as two parts of an integrated whole. And, while we would not say that the Petitioner's somewhat inelegant locution—one part *Harper & Row* and one part *Sony*—is a definitive statement of the proper test, it does suffice as a fair marker.

In contrast, the Petitioners' proposed second test—which is indisputably a proper test for judging enactments touching on speech interests that are *not* Copyright Clause enactments—is not derived from the Court's copyright cases, does not take into account the structural relationship of the Copyright Clause and the First Amendment in the Constitution, has never been applied to judge the constitutionality of a Copyright Clause enactment, and does not provide a proper basis for making such judgments.

The Constitution's text speaks directly to the constitutional system for advancing and protecting free speech in two places. The Copyright Clause expressly grants to Congress the power to enact legislation to "secur[e] for limited Times to Authors . . . the exclusive Right to their . . . Writings. . . ." And, the First Amendment states the injunction that "Congress shall make no law . . . abridging the freedom of speech." We would suggest that this text teachs three lessons that are to the point here.

First, as this Court has stated, "The Framers intended copyright itself to be the engine of free expression." *Harper & Row*, 471 U.S. at 558. And, the Framers most certainly

understood that a grant to authors of the exclusive right to their writings as a means of promoting expression entails a negation of the right of third persons to reproduce and disseminate the authors' writings. Those two points being so, the conjunction of the Copyright Clause and the First Amendment as the Constitution's two express speech provisions demands the following conclusion: federal legislation for effectuating an exclusive rights intellectual property system of the kind the Framers knew and favored is not "legislation . . . abridging the freedom of speech" violative of the First Amendment but legislation that furthers the overall constitutional plan for advancing and protecting free speech. That is the only conclusion that makes sense of what the Constitution says and that does not put the Constitution's two speech provisions—one a positive grant of legislative power, the other a negative check on legislative power—into constant conflict.

Beyond that, the Copyright Clause grant of legislative power, which speaks in general and not specific terms, is a grant that plainly empowers Congress to go beyond enacting an initial copyright law, such as that embodied in the 1790 Act, by adapting that law's norms to the changes in the social, economic and technological factors that affect the creation and dissemination of works and our understanding of what legislative actions are effective in promoting the creation and dissemination of works. It follows from what we have said about the Copyright Clause/First Amendment intersection that copyright law amendments that elaborate basic copyright norms in a manner that is consistent with basic copyright principles (and most particularly with the "fair use" principle and the idea/expression dichotomy, *see* note 5 *supra*) are laws that are consistent with the First Amendment and not laws "abridging the freedom of speech." Like the 1790 Act, such enactments are validated by the Constitution's two speech provisions read together as a whole.

Third, and finally, the heightened-scrutiny First Amendment test of *Turner Broadcasting* that applies to various and sundry enactments that touch on speech interests in any of a myriad of ways is inapposite in judging the constitutionality of Copyright Clause laws like the 1998 Act.

There is nothing in the Constitution's text or in the constitutional materials that throws so much as a cross-light on whether or not a statute like the *Turner Broadcasting* "must carry" law (enacted pursuant to the Commerce Clause), that affects speech interests in a novel or idiosyncratic way, is a "law abridging the freedom of speech." Given the nature of the First Amendment protection of freedom of speech and the absence of any further guide in the Constitution's text, the Court has put the burden on the Government in such cases to make a *Turner Broadcasting* showing as a means of carrying its burden to demonstrate that its legislative action is not an improper intrusion into the free speech regime.[7]

In contrast, for the reasons we have given, where the challenge is to a law elaborating a basic copyright norm in a manner consistent with copyright principles, the text of the Constitution's two speech provisions, without the need for a supplemental government showing, provides the legal basis for the conclusion that the law is not a law that improperly intrudes into the free speech regime. The Constitiution provides for an exclusive rights intellectual property system—that by its nature affects both author and third person speech interests—as an *integral component* of the free

[7] *See, e.g., Hill v. Colorado*, 530 U.S. 724 (2000) (law prohibiting approaching within eight feet of another without his consent in a 100-foot zone around a health care facility); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (law regulating sound amplification in public park); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (law regulating sleeping in public parks applied to camping in tents as a form of expression); *United States v. O'Brien*, 391 U.S. 367 (1968) (law prohibiting mutilation of draft cards).

speech regime, and not as a *suspect intrusion* that threatens to upset that regime.

To paraphrase and answer the Petitioners' second Question Presented in light of the foregoing: A law like the 1998 Act that elaborates a basic copyright norm in a manner consistent with copyright's basic principles is categorically (as such a copyright law) valid under the First Amendment.

2. Since we began with the Petitioners' first test for judging the constitutionality of the new works aspect of the 1998 Act, it is helpful to restate our argument that this enactment is constitutional in terms of the Petitioners' *Harper & Row/Sony* test.

(a) As *Harper & Row* explains, "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." 471 U.S. at 558. On that basis, the Court rejected the argument that third persons have a First Amendment right to commercially exploit works of "public interest," reasoning that "the public soon would have nothing worth reading" if copyright could not guarantee the author the exclusive right to exploit such works. *Id.* at 559.

By extending the copyright term as it stood at the time of *Harper & Row* (then it was the author's life plus 50 years), the 1998 Act "supplies [an enhanced] incentive to create and disseminate ideas"—and most particularly to disseminate ideas by distributing and redistributing works over periods of time—thereby making copyright a stronger "engine of free expression."

The CTEA's elaboration of the basic copyright norm setting the term of copyright is moreover entirely consistent with basic copyright principles. In exercising its power to reset the terms of copyright, Congress acted in the manner of all previous Congress, considered the factors all previous Congress had considered, and acted within the limiting guidelines all previous Congress had recognized. *See supra*

at 8-9. And, in this instance, Congress took *no* action to augment in any way the copyright owner's exclusive rights as they stood at the time or to work any diminution in the kinds of uses third persons who are creating and distributing works can make of copyrighted works under the copyright law's "fair use" provision or otherwise. Congress, in other words, acted in a manner that strengthened copyright as a "engine of free expression" and did so without making any alterations to the engine's structure.

(b) Turning to the *Sony* portion of the Petitioner's test, the 1998 Act can not be characterized as a law that "merely inhibit[s] access to ideas without any countervailing benefit." The 1998 Act, in its new works aspect, provides at least two countervailing benefits. First, by providing authors a longer period to seek a profit by marketing their works, the 1998 Act—like its predecessors the 1976 Act, the 1909 Act, and the 1831 Act—strengthens the incentive to create new works. Second, as we have explained, the Act strengthens the incentive to make periodic efforts to disseminate works over time. *See supra* at 16-18.

To be sure, one group of Petitioners' *amici curiae* argue that the 1998 Act does not provide a sufficient incentive to the creation of new works to pass First Amendment muster. See Brief of Jack M. Balkin *et al.* at 23. That argument rests on the proposition that, as a matter of microeconomic theory, the marginal inducement to create a new work that is provided by the possibility of a reward that would inure to the author's benefit more than a handful of years from the date of creation is "very small," and thus too negligible to justify restrictions on unauthorized third person exploitation of the author's work thereafter. See Brief of George A. Akerlof *et al.* at 5-7.

Why this theory provides the First Amendment basis for evaluating a term extension law's benefits we are not told. And, why this theory is sufficient to invalidate a life plus 70 year term on First Amendment grounds, but not the 1976

Act's life plus 50 year term, the 1909 Act's 56-year term, the 1831 Act's 42-year term, and even the 28-year term adopted by the First Congress, is never explained even though each of those enactments provided for the author's exclusive right to market his work long after its initial creation.

We would add that this argument from microeconomic theory rests on a misstatement of the copyright law's goals and its means for reaching its goals and thus provides no basis to nullify *any* of the copyright terms that Congress has set from 1790 to 1998. The argument is predicated on the erroneous premise that the sole point of copyright is to stimulate the *creation of new works* in the same manner as a law providing only for an immediate grant payment to an author who creates a new work. *See, e.g.*, Pet. Br. at 40. In truth the means by which a copyright regime furthers speech is "[b]y establishing a marketable right to the use of one's expression," thereby "supply[ing] the economic incentive to create *and disseminate*" works, *Harper & Row*, 471 U.S. at 558 (emphasis added), and to generate "broad public availability of literature, music, and the other arts." *Twentieth Century Music*, 422 U.S. at 156. A skewed assessment of the benefits of a copyright term extension law that takes no account of its benefit in fostering distributions of works over time provides no support for declaring the law unconstitutional.

II. THE ASPECT OF THE 1998 ACT ESTABLISHING THE COPYRIGHT TERM APPLICABLE TO EXISTING WORKS IS CONSTITUTIONAL

It follows ineluctably from the foregoing showing that the existing works aspect of the 1998 Act is constitutional as well.

A. *The Copyright Clause.* It is decisive with respect to the "limited Times" requirement of the Copyright Clause that the extended term applicable to existing works under the 1998 Act is the *same term* as the term that applies to new works.

We have shown that insofar as it governs new works this term is a proper Copyright Clause "limited Times" term. And, there is no logic to the proposition that Congress transgresses the "limited Times" requirement of the Copyright Clause by providing that the term for existing works shall be the same total number of years as for new works. In both instances, the period is equally limited.

Petitioners' suggestion that even if the 1998 Act on its face sets a proper "limited Times" term, it should not be judged for what it is—but as merely a temporary stopping point on a congressional march toward providing "perpetual" terms for existing works—has no basis in what Congress has in fact done. Congress has only extended the basic copyright term four times—in 1831, 1909, 1976, and 1998—and in each instance Congress has set a proper "limited Times" term for new works and has provided for parity between new works and existing works under copyright.[8]

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[8] Beginning in 1962 and continuing through the mid 1970's, Congress—anticipating that it would extend the term of copyright for new and existing works as part of a comprehensive copyright law revision then underway—enacted a series of temporary one and two-year interim extensions of copyright for existing works still under copyright. *See* H.R. Rep. No. 94-1476, at 134 n.1 (citing and stating purpose of interim extension laws). In 1976, Congress enacted the anticipated revision and in so doing established an identical term of 75 years from the date of publication for all works published prior to the effective date of the 1976 Act and still under copyright. The 75-year term was chosen for pre-enactment works, principally because the 75-year term was viewed as the closest equivalent of the life-plus-50 term. See p. 9 *supra*.

The effect of the 1976 enactment was to provide a duration regime no different than the one that would have obtained had Congress by a single Act adopted a life-plus-50 term for new works and the 75-year term for pre-existing works. It is therefore misleading for the Petitioners to suggest that Congress revisited the question of the basic term multiple times during the 1962-1976 time period. In fact, Congress made just one judgment during that time period—that the term for new works would be extended and that existing works would be treated equally—but the vicissitudes of the legislative process made it necessary to take several interim steps in order to effectuate that judgment.

Moreover, recent Congresses—toward which the Petitioners direct particular criticism—have *not* demonstrated any intent to frustrate the entry of works into the public domain. Every year between 1978 and 1998, works published 75 years earlier entered the public domain. And from 1976 until 1993—when the European Union life-plus-70 directive triggered Congress' historical concern with the alignment of the United States Copyright term and international standards—Congress did not so much as consider extending the term of copyright.

The specter Petitioners raise of a congressional scheme to establish a perpetual term sub rosa is fanciful.

2. The "existing works" aspect of the 1998 Act promotes "Science" in two respects.

First, the 1998 Act's term extension promotes the dissemination and periodic re-dissemination of existing works that are in the extended part of their term in exactly the same way as would a law setting an identical term passed prior to the time those works were created. In so doing, the Act promotes "Science"—*viz.*, knowledge and learning—in precisely the way that copyright law is intended to promote knowledge and learning. See *supra* at 10-18.

The Petitioners never do business with this dispositive point. Instead, they insist that the broad dissemination and periodic re-dissemination of works to the public has nothing to do with advancing knowledge and learning, and that only "new creation" can do so.

We have demonstrated in detail the error of the Petitioners' position in this regard. *Supra* at 10-15. At the risk of undue repetition, this Court's decisions in *Twentieth Century Music Corp.* and *Harper & Row* establish that copyright's ultimate goal is to promote the widespread dissemination of authors'

works. And, the Court could hardly have concluded differently. Knowledge and learning are not well served by solipsism; an author who creates works of intellectual value solely for herself does far less to further knowledge and learning than an author who creates the same works and undertakes the task of disseminating those works to the public.

Second—and contrary to Petitioners' assertion that extending the copyright in existing works cannot possibly have the effect of inducing the creation of new works—Congress' uninterrupted pattern of providing extensions of copyright for existing works in conjunction with extending the term for new works does exert such an effect. It does so by advising authors that if they create a work, they can reasonably expect to be accorded equal treatment if and when Congress makes a determination that the copyright term should be extended for new works.

Petitioners proceed from the premise that authors in deciding whether to create a new work are in a state of perfect half-ignorance: on the one hand, Petitioners would have it, authors are keenly aware of the term of the copyright appearing in the statute books; but, on the other, they are wholly unaware of the unbroken line followed by multiple Congresses of providing to existing works the benefit of the extended term considered appropriate for new works.

That premise is too contradictory to withstand scrutiny. Those who are legally and economically sophisticated enough to know the particulars of copyright will also be sufficiently sophisticated to know of and to take note of the history of extensions to the term of copyright and of the equal treatment that Congress invariably has accorded works under copyright as of the time of a copyright term extension. That sense of assurance that copyright law will accommodate changed circumstances and treat authors fairly is surely a substantial inducement to create new works.

B. *The First Amendment.* In contrast to the Petitioners' First Amendment attack on the new works aspect of the 1998 Act—which is bottomed on the assertion a twenty-year addition to the term of copyright that a life-plus-70 term does not *sufficiently* advance the governmental interest in stimulating the creation of new works to justify—their attack on the existing works aspect of the Act is that an increase in the term for these copyrighted works does not advance the interest in creating new works *at all*. Pet. Br. at 40. That is fatal, say Petitioners, because the only governmental speech-promoting interest that justifies a copyright law is the interest in stimulating the creation of new works. Pet. Br. at 40 ("the only content-neutral interest that this Court has recognized as sustaining copyright's speech restrictions—namely, providing incentives to authors to create original works, *Harper*, 471 U.S. at 558—is irrelevant once a work has been created").

This is the same premise that underlies Petitioners' argument that the existing works aspect of the 1998 Act fails to "promote Science," and it is erroneous for the same reason. Copyright, as we have emphasized, is *not* concerned solely with, and is *not* justified solely by, stimulating new creative works. As this Court has said in *Twentieth Century Music*, "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music, and the other arts." 422 U.S. at 156 (emphasis added). *See also* discussion *supra* at 10-15. For precisely that reason, copyright also is very much concerned with—indeed is centrally concerned with—stimulating the wide dissemination of works already created. And, that dissemination interest is a speech-enhancing interest just as surely as is the interest in stimulating the creation of new works.

The recognition that the existing works aspect of the 1998 Act serves the governmental interest in stimulating the wide dissemination of works already created dooms Petitioners' First Amendment claim. As noted, Petitioners have proposed

two irreconcilable tests, one derived from *Harper & Row* and *Sony* and one derived from *Turner Broadcasting*. And, as we have shown, only the former test is basically consistent with the Constitutional plan and this Court's copyright jurisprudence. Under that test, a copyright provision that "protects an engine of free expression" and that does not "merely inhibit access to ideas without any countervailing benefit," is to be upheld. Pet. Br. at 36-37 (internal quotation marks omitted). The 1998 Act in its existing works aspect, as in its new works aspect, "protects an engine of free expression" by providing an enhanced incentive for the broad dissemination of works over time. And by so doing, the Act provides a real and substantial benefit and is not a "mere[] inhibit[ion] [on] access to ideas."

We would add that even accepting *arguendo* Petitioners' premise that inducing the creation of new works is the sole legitimate First Amendment justification for copyright, the 1998 Act still passes muster. As we have shown, the 1998 Act by continuing the unbroken line begun by the First Congress of providing that the term applicable to new works will be equally applicable to works already in existence, reinforces Congress' assurance to authors that any new works they create will enjoy the benefit of whatever term extensions are considered by Congress to be appropriate in the future. *See supra* at 28. In so doing, the Act makes good on this inducement to authors to create new works and thereby promotes a governmental interest that even Petitioners acknowledge to be sufficient to satisfy First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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